No. 141

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1905.

In the Supreme Court U. S.
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JAMES H. McKENNEY, Clerk.

THE LAST CENTRAL EUREKA MINING COMPANY (a corporation), JAMES TOMAN, and ELIZA A. TOMAN,

Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (a corporation),

Defendant in Error.

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BRIEF, POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR

ON MOTION TO DISMISS WRIT OF ERROR.

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No. 447

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ON MOTION TO DISMISS WRIT OF ERROR.

Defendant in error, in advance of argument on the merits, moves for dismissal of the writ for want of jurisdiction of this court, because no Federal question is presented by the record.

The title to an ore vein of great value is involved, and a similar motion and contention made on the part of defendant in error in the case of the Argonaut Mining Company v. Kennady, also represented by opposing counsel here, was recently decided in this court against his contention. That case is a controlling precedent here.

The point made by opposing counsel is "That " the record no where discloses any claim of right " personal to plaintiff in error asserted by it under " any Federal statute" (See top of page 10 of brief of opposing counsel).

The argument of defendant in error is that its patent is issued under the Act of 1872; that the construction of that statute as made is in favor of its rights; and that while had it lost below and sued out this writ of error, there would have been presented by the record a Federal question, because the decision would have been against the rights claimed by it under the Act of Congress of 1872 (see pages 7 and 8, opposing brief), yet (1) this law does not apply to us and there is for us no Federal question, because we do not claim under the Act of 1872, or, I suppose under any other Federal statutes or (2) if we do the decision on the construction of such statutes is not against our rights.

(2) As to the second objection above noted, obviously the decision is against our rights as is seen by the opinion of the Supreme Court of the

State concerning the Act of 1872, and by our assignments of error (Rec. fols. 221 to 231). As the complaint admitted that the defendant's title to the premises known as the Toman Ranch is derived from the two patents issued by the Government of the United States to the predecessor in interest of defendants (see record fol. 17), we had no occasion to offer those patents and they are in evidence only to the extent of plaintiff's admission in the court below (see fol. 17, record). The decision was against our interest under the statutes relative to disposal of agricultural lands and the patents issued thereunder, which we assert conveyed to us the entire title to the property, notwithstanding the reservations in the patents; and also against our rights under the Act of 1872.

Defendant in error asserts in his brief that the Act of 1872 was construed in his favor. The decision on the rights of respective claimants under these respective statutes of necessity involved a construction of the statutes and present a federal question. Aside from this we now turn to the first objection above noted and in regard to that we assert that we also claim under the limitations contained in the Act of 1872 on the power of the government to issue a valid patent to our opponents.

It remains therefore to examine whether plaintiffs in error legally claim any rights under the Act of 1872. It is quite evident that we do claim such rights and so it appears by the record, and on

this point the construction of the Act of 1872 was also against our rights.

It is obvious that the Act of 1872 contained provisions, some of which were favorable to the defendant in error, some of which were favorable to the plaintiff in error; for instance, the Act conferred power on the Land Office to issue patents for mineral lands. This is favorable to the defendant in error. On the other hand, the same Act and Section contained a provision favorable to plaintiff in error, to wit, the limitation that such patents should not be issued unless the end lines on the survey of the mine making the contest were parallel.

The plaintiffs in error asked that their rights under the Act of 1872 be protected by a construction of that act in regard to the necessity for such parallelism; as to whether the Act meant that the end lines of all surveys must be parallel—or of surveys only located after the Act went into effect.

The court below recognized the right of the plaintiffs in error to a construction of that provision of the Act. This construction we will observe involves a proposition of law and not a proposition of fact as seems to be asserted in the brief for defendant in error; a proposition of law decided against a right personal to plaintiffs in error under the Act of 1872. We properly therefore had our writ of error.

But it is said plaintiffs do not *claim* title under the Act of 1872. They certainly do, and the record

shows it. They claim title not only under agricultural patents but also under the *limitation on the rights of defendants in error* presented in the Act of 1872.

This point is readily seen. The defendant in error was the plaintiff below. On the proofs his case would have been made by the production of his mineral patents alone. He was not required to present or prove or rely on the Act of 1872. The patents alone with possession under them proved his case without more.

But he did *plead the Act of 1872* and it appeared in his complaint that he relied upon it. Defendant below offered his agricultural patents and drew the attention of the court to the limitation on the granting power in the Act of 1872, which forbade the authorities of the Land Office to issue the patent under that Act where end lines were not parallel. This supplemented by proofs that the end lines were not in fact parallel presented to the trial court the necessity of construing the Federal statute as to whether the Act required such parallelism and if such parallelism did not exist, whether the plaintiff had any title to the property. The decision was adverse to the rights claimed by this defendant now plaintiff in error, under the agricultural patents and under the Act of 1872, as is seen by the opinion both in the Court in Amador County and in the Supreme Court.

The opinions below, especially of the Supreme

Court of the state passed emphatically upon the limitation of the Act of 1872 and held that such limitation had no application, although the end lines were not parallel.

If we are correct that we had a right as a matter of defense to introduce and rely on the limitations on the granting power contained in the Act of 1872 in support of our title under the agricultural patents and the Acts of Congress authorizing their issuance, it is clear that we asked the construction by the court of the limitations contained in the Act of 1872 in support of our rights and on that portion of the statute the decision was against the right asserted by us. Here then we have a Federal question presented by us involving the construction of the Act of 1872 and a decision against the right asserted by us under that statute.

The next point made is as to the question whether the claim of right made by us under the Acts of Congress and under the Act of 1872 sufficiently appears from the record. We assume that it is not necessary for us to state in our answer matters already stated in the complaint.

The object of the requirement on the defendant to plead "Some part of the Constitution of the United States or any Act of Congress relied on," is not purely technical nor simply to set a trap for an incautious pleader but to compel him to give notice to the opponent of the Acts on which plaintiff relies and thus prevent surprises on the trial

in the lower courts as is obvious from the opinion cited by counsel on the other side on page 22 of his brief (187 U. S. 155-157). We had to give fair notice of the existence of that on which we intended to rely and should have given it in the court below.

It will be observed in this case that the plaintiff below relies on the Act of 1872 and pleads it, and the answer specially states the *want of parallelism of the end lines,* although it is true the answer does not state "as required by the Act of 1872" but the statement by the plaintiff below in his pleading as to the Act of 1872 made such reference unnecessary; our statement was sufficiently explicit. In speaking of his own patent, the plaintiff below alleges in his complaint (see folio 16), "said patent was issued " in pursuance of and in conformity with the Re- " vised Statutes of the United States, Title 32, " Chap. 6," and then at folio 17, "the defendants " are and for several months last past have been " the owners of the tract of land next adjoining " said Summit Quartz Mine on the east and being " the premises commonly known as the Toman " Ranch. Said defendants title to said premises " known as the Toman Ranch is derived from two " patents issued by the Government to predecessor " in interest of the defendants". The diagram showing the want of parallelism of the end lines is made a part of this complaint. It asserts at folio 20 that "defendants in this action have no " right, title or interest in or claim to any part " or portion of said vein, lode or ledge hereinabove

" described or to any vein, lode or ledge which has " its top or apex within said Summit Quartz Mine " and which in its downward course enters, extends " to, penetrates or underlies the premises known " as the Toman Ranch and belonging to defend- " ants." It asserts in the same folio "that the title " to said veins, lodes and ledges having apices in " said Summit Quartz Mine and extending into and " underlying the surface of said premises known " as the Toman Ranch had been and *was severed* " *from the title to said surface* and had been granted " and conveyed by the United States as aforesaid, " to the grantors of this plaintiff *under and in pur-* " *suance of the laws of the United States regulating* " *the sale and disposal of the mineral lands of the* " *public domain* and generally that the rights of the " defendants were subject to the rights of the " plaintiffs," etc.

The answer denies at folio 33 that the title of the veins, lodes or ledges or any of them, etc., " * * * extending into and underlying the sur- " face of the Toman Ranch had been or was severed " from the title to the surface of said Toman Ranch " and that they had been granted or conveyed by " the United States as in the complaint alleged or " at all to the grantors of the plaintiff under or " in pursuance of the laws of the United States " regulating the sale or disposal of the mineral " lands of the public domain, or in any manner " whatsoever."

The issue presented on the record then, is whether (see folio 16) the plaintiff below held patents issued in conformity with the Revised Statutes of the United States, Title 32, Chap 6. And since the plaintiff had made this allegation and the defendant denied it, what necessity existed for again putting this matter in issue by an affirmative allegation on the part of defendant in error?

Furthermore that this point in issue was thoroughly understood appears from the statement in court of the counsel for the defendant in error (see folio 55), as follows: "When the patent is "introduced in evidence your Honor will see as "you see from the map referring to plaintiff's ex- "hibit No. 3, that the end lines are not parallel and "it is contended by the defendant *that for that* "*reason the plaintiff has no extra lateral right.*" The findings of the court of Amador County at folio 43 of the record say that "said patent was "issued in pursuance of and in conformity with "the Revised Statutes of the United States, Title "32, Chap. 6 * * *. The title of defendants "to the premises known as the Toman Ranch is "derived from two patents issued by the United "States to the predecessor in interest of the de- "fendants"; then follows the reference to the diagram showing the want of parallelism in the end lines.

At folio 47 we have the finding that the defendants in this action "have no right, title or interest

" in or claim to any part or portion of said vein, " lode or ledge hereinbefore described, or to any " vein, lode or ledge which has its apex or apices " within said Summit Quartz Mine, and which in " its downward course enters, extends into or under- " lies the premises known as the Toman Ranch. " Then comes the decision that the title to said " veins had been severed from the title to said " surface and had been granted and conveyed by " the United States, as aforesaid, to the grantors " of plaintiff *under and in pursuance of the laws " of the United States regulating the sale and dis- " posal of mineral lands of the public domain.* The " ownership, possession or right of possession of " defendants and their grantors in and to the " premises known as the Toman Ranch, and to each " and every portion thereof are, and at all times " were subject to the rights and interests of this " plaintiff in and to said veins, etc. * * *." All the ore, mineral deposits, lodes, veins or ledges heretofore or now cut, exposed, open, worked or appropriated by means of said underground works of plaintiff, or by plaintiff in the course of such working and mining underneath the premises described as the "Toman Ranch", are part of such ledge having its top or apex wholly within the boundaries of said Summit Quartz Mine *and within the end lines of said mine projected in their own direction.*

In the judgment at page 52 the court finds that the plaintiff owns the premises described in the complaint "comprising 117,656 linear feet of the

Summit Quartz Mine on which the vein together with all veins, lodes, and ledges having their apex or apices within the extralateral boundaries of said land above described and *within the end lines of said premises* as above described projecting in their own direction through said veins, lodes and ledges, etc. So at folio 53, parties are enjoined from asserting any claim or interest in any vein, etc., in any part of its downward course *within the end lines of said mine,* projecting in their own direction, etc., and the defendant in his bill of exceptions specified the following particulars in which the evidence was insufficient to justify the decision (see folios 168 and 169). The exception is found at the top of page 77. "But limiting the right of possession to "such outside parts of said veins or ledges within "such portions thereof as lie between vertical plains "drawn downward through the end lines of above "described premises continued in their own direc-"tion, in this that the evidence shows that the end "lines of the Summit Quartz Mine as patented by "Hall McAllister *were not parallel,* and the evi-"dence further shows that the patentee under the "patent to the Summit Quartz Mine had no right "to pursue any vein, lode, ledge or deposit beyond "the exterior boundary lines of said Summit Quartz "Mine extended downward, vertically". (See also objection two to the decision taken at the trial, folio 170.) "The evidence shows that the end lines of "said Summit Quartz Mine *were not parallel* and "that said patent was issued under the laws of the

" United States adopted May 10th, 1872, to wit:
" 'An act to promote the development of the mining
" 'resources of the United States,' *which act re-*
" *quired the end lines should be parallel,* etc."

These objections to the decision and findings were taken in the lower court and under the laws of California, were reviewable by the Supreme Court on the appeal. They constitute a part of the record just as did the findings themselves (see Section 657, C. C. P.), and when this question of jurisdiction is determined, the court on the merits will necessarily determine whether or not these objections are well taken. So far as the determination of the rights of plaintiff in error is concerned in the Supreme Court of the state, the opinion of the Supreme Court found at folios 193-4 shows that the Supreme Court passed on this very question of the rights of the plaintiff in error under the Act of 1872, commencing with folios 197-8 to the effect that "the evidence recites that the proceedings were
" had in pursuance of the Act of July 26, 1866, the
" Act amendatory thereof passed July 9th, 1870, and
" the Act of May 10, 1872, and the patent is issued
" inconformity with said Acts, the court says: 'De-
" 'fendants contend, however, that notwithstanding
" 'the attempted conveyance in terms, of the prop-
" 'erty in dispute, the *patent failed to convey* any
" '*extra lateral rights,* by reason of the facts that
" 'the end lines of plaintiff's claim, as located,
" 'surveyed and granted, *were not parallel,* as re-
" 'quired by the Act of May 10th, 1872,' but the

" court decides that this requirement that *end lines* " *should be parallel relates only* to the end lines " of mines which were located after the Act of May " 10th, 1872 went into effect." We find no such provision in the Act. The court then says at folios 201-2, "So far as the particular requirements as " to parallelism of end lines is concerned, it would " appear to be well settled that it has no applica- " tion to locations made prior to the Act of May " 10th, 1872." It would seem to us as if the court had in this opinion construed the Act of 1872 in regard to the necessity for parallelism in end lines of mines located prior to the passage of the Act, and had determined that no such parallelism was necessary to make the patent valid. This determination seems to us to be adverse to the rights claimed by the plaintiff in error under the Act of 1872, and therefore a Federal question is presented.

The above considerations render an examination of the authorities presented unnecessary. They have no application to the case as it stands on this record.

Respectfully submitted,

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